

Nos. 14-2222, 14-2339

**IN THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

NESTLE DREYER'S ICE CREAM COMPANY,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition for Review and Cross-Application for Enforcement
of a Decision and Order of the National Labor Relations Board

**BRIEF OF INTERVENOR INTERNATIONAL UNION
OF OPERATING ENGINEERS LOCAL 501
IN SUPPORT OF RESPONDENT**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

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Date: 2/24/15

Counsel for: IUOE Local 501, AFL-CIO

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**BRIEF OF INTERVENOR INTERNATIONAL UNION
OF OPERATING ENGINEERS LOCAL 501
IN SUPPORT OF RESPONDENT**

STATEMENT OF THE CASE

A. International Union of Operating Engineers Local 501 (“the Union”) represents stationary engineers and other skilled maintenance employees in Southern California and Southern Nevada. In October 2011, the Union filed a petition with the National Labor Relations Board (“NLRB” or “the Board”) seeking to represent a bargaining unit consisting of full-time and regular part-time maintenance employees at an ice cream manufacturing and distribution facility in Bakersfield, California owned by Nestle Dreyer’s Ice Cream Company (“Dreyer’s” or “the Company”). Decision and Direction of Election (DDE) 1, 3; Joint Appendix (JA) 402, 404. Dreyer’s opposed the Union’s petitioned-for bargaining unit, contending that the unit was inappropriate and that the smallest appropriate unit would include both maintenance employees and production employees. DDE 1-2; JA 402-03.

The petitioned-for unit consisted of approximately 113 employees who provide skilled maintenance throughout the Company’s facility. DDE 3; JA 404. About half of these employees “provide skilled mechanical support to the [26 production] lines.” *Ibid.* Another 16 “palletizing mechanics . . . provide support to the palletizing areas.” *Ibid.* The “Utilities Group” is composed of 15-16

maintenance employees “who are in charge of maintaining the [plant]’s ammonia refrigeration systems and all other systems, such as the boilers.” DDE 4; JA 405. Approximately 12 “process technicians” work as “mechanics . . . [whose] responsibility is to support mix making and getting mix to the line,” including by maintaining “the pipes and . . . electrical controls.” JA 201, 286. “Facility mechanics take care of the building,” including plumbing and maintaining the facility’s lighting, fire and alarm systems. JA 287. The remaining maintenance employees are “shop mechanics,” who either “work[] out of the machine shop, which fabricates parts for the production lines” or out of “smaller shops at each business unit that maintenance mechanics use for quick repairs of damaged or malfunctioning parts.” DDE 4; JA 405.

The NLRB Regional Director applied the Board’s traditional approach to bargaining unit determinations as most recently described in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011), enfd. sub. nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), to the facts established at the hearing on the union’s petition. On this basis, the Regional Director concluded that the petitioned-for unit of maintenance employees was appropriate.

The Regional Director reached that conclusion by applying the Board’s traditional community of interest factors to find that “[t]he maintenance employees

share a community of interest amongst themselves for purposes of collective bargaining.” DDE 16; JA 417. The Regional Director’s finding of a “share[d] . . . community of interest” was based on the maintenance employees’ “common skills,” common required training, common requirement that they “provide their own costly tools,” “common supervision amongst themselves,” “common functions” within the plant, “similar wages,” and “similar hours.” DDE 16-19; JA 417-420.

Again applying the Board’s traditional community of interest factors, the Regional Director also found that the maintenance employees constitute a “distinct group,” DDE 19; JA 420, that is “readily identifiable as a separate group . . . from production employees,” DDE 15; JA 416. The Regional Director’s finding of the “distinct” and “separate” interests of maintenance employees was based on the facts that: “[m]aintenance mechanics, unlike any production employees, are required to have one year experience in computerized maintenance management, two years experience in troubleshooting pneumatics, hydraulics, and electrical and manufacturing, and five to seven years experience in industrial high speed maintenance;” maintenance employees and production employees are separately supervised; “maintenance employees are in a separate departmental section” and “different job classifications than the production employees;” and the two groups have separate functions in the plant in so far as “the maintenance employees are

primarily in charge of maintaining the Employer's machinery, and the production employees are primarily in charge of producing the ice cream." DDE 14-16; JA 415-417.

In reaching these conclusions, the Regional Director carefully considered Dreyer's claim that a unit composed solely of maintenance employees is not appropriate. The Company argued that "bargaining history weighs in favor of finding that a maintenance-only unit is inappropriate" based on a short period in the 1980s when the Teamsters represented employees of a predecessor employer at the facility and two subsequent unsuccessful efforts by unions to organize the plant's maintenance and production employees. DDE 11-12, 20; JA 412-13, 421. But the Regional Director found that argument unpersuasive on the basis that "[t]he brief and inconclusive bargaining history here consists of . . . one contract and in invalidated certification of election," and that "[t]he record is unclear whether the contract was even in effect for its full term, as the Teamsters [who were voluntarily recognized by a predecessor employer in 1988] agreed to stop representing the employees in settlement of an unfair labor practice charge filed shortly after the contract went into effect." DDE 12, 20; JA 413, 421. Further, the Regional Director noted that "neither the . . . contract nor the invalidated certification of election were determined by the Board; rather they were determined by the parties only by means of voluntary recognition and a stipulated

election agreement,” and therefore are not significant to the Board’s unit determination in this case. DDE 20-21; JA 421-22.

Dreyer’s also argued that a pilot program to train production employees “to perform simple preventative maintenance historically performed by maintenance mechanics, such as to clean, inspect and lubricate the machinery on the production lines,” DDE 9; JA 410, provided an additional basis for finding the petitioned-for unit inappropriate. DDE 21; JA 422. The Regional Director found, however, that the pilot program was launched on the same week as the NLRB hearing on the Union’s petition, and then only on just one of the Company’s 26 production lines. *Ibid.* Given the timing and scale of the pilot program, the Regional Director concluded that it was “far too speculative to conclude that the program w[ould] be successful” and, “[e]ven assuming the program will succeed . . . , the production employees would then be performing only minor and routine maintenance duties requiring lesser skills on a single line.” *Ibid.*

Finally, Dreyer’s argued that several prior Board decisions finding units of maintenance employees inappropriate supported its contention that the unit in this case is inappropriate. DDE 20; JA 421 (discussing *Buckhorn, Inc.*, 343 NLRB 201) (2004); *TDK Ferrites Corp.*, 342 NLRB 1006 (2004); *Peterson/Puritan Inc.*, 240 NLRB 1051 (1979); and *Chromalloy Photographic*, 234 NLRB 1046 (1978)). After reviewing each of the cases cited by the Company, the Regional Director

found them “readily distinguishable” on the basis that either the petitioned-for employees and excluded employees shared a much stronger community of interest than is present in this case, *ibid.* (discussing *Buckhorn* and *TDK Ferrites*), or that, unlike here, the unions in the cited cases had petitioned for “arbitrary and fractured unit[s]” rather than traditional maintenance employee units, *ibid.* (discussing *Peterson/Puritan* and *Chromalloy Photographic*).

In sum, the Regional Director concluded that Dreyer’s had failed to prove that the maintenance employees and production employees had so much in common that they could not bargain separately. In this regard, the Regional Director explained that “[a]lthough factors the Employer points to might show that a combined unit is an appropriate unit, these factors are not sufficient to render the petitioned-for unit inappropriate.” DDE 19-20; JA 420-21. The Regional Director thus ordered an election in the petitioned-for unit of maintenance employees. DDE 21-22; JA 422-23.

B. Dreyer’s filed a request for review of the Regional Director’s decision with the NLRB. A unanimous panel of the Board denied that request, with NLRB Member Brian Hayes, who dissented in *Specialty Healthcare*, joining his two colleagues in that denial. *Nestle-Dreyer’s Ice Cream*, Case 31-RC-66625 (Dec. 28, 2011) (unpublished order); JA 426. Member Hayes explained in a footnote that he “agrees that a unit of maintenance employees is an appropriate unit” and that,

although he would not have relied on *Specialty Healthcare* to reach that conclusion, “under the traditional community-of-interest test, the interests of the petitioned-for [maintenance] unit are sufficiently distinct from the production employees.” *Ibid.*

On January 4, 2012, the Board conducted an election among the maintenance employees in which the majority of employees voted in favor of representation by the Union. JA 437. Dreyer’s refused to bargain with the Union in order to test the Board’s bargaining unit determination, leading the Union to file an unfair labor practice charge. *Ibid.* The Board then issued a decision and order finding that Dreyer’s had committed an unfair labor practice by refusing to recognize and bargain with the Union. *Nestle-Dreyer’s Grand Ice Cream, Inc.*, 358 NLRB No. 45 (May 18, 2012); JA 428.

In a previous proceeding in this Court, Dreyer’s petitioned for review of the Board’s May 2012 decision and order, challenging both the substance of the Board’s bargaining unit determination and also whether the Board had a lawful quorum at the time it issued its decision because three of its five members had received recess appointments at a time when, Dreyer’s argued, the Senate was not in a recess. *Nestle-Dreyer’s Ice Cream Co. v. NLRB*, Nos. 12-1684, 12-1783 (*Nestle-Dreyer’s I*). This Court ordered that case held in abeyance pending this Court’s decision in *Enterprise Leasing Co. Southeast, LLC v. NLRB*, 722 F.3d 609

(4th Cir. 2013), which also concerned the recess appointments to the Board. *See Nestle-Dreyer's I*, docket no. 60 (April 3, 2013). After this Court held that the recess appointments were unconstitutional, *Enterprise Leasing*, 722 F.3d at 612, this Court again ordered *Nestle-Dreyer's I* held in abeyance, this time pending the outcome of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), concerning the same recess appointment question. *See Nestle-Dreyer's I*, docket no. 78 (Jan. 13, 2014).

In *Noel Canning*, the Supreme Court held that the Senate was not in recess when the three NLRB members were appointed such that the appointments were invalid and the Board lacked a lawful quorum. 134 S. Ct. at 2557. Following that decision, the NLRB successfully moved this Court to vacate the Board's May 2012 decision and order and remand the case back to the Board for further consideration in light of *Noel Canning*. *See Nestle-Dreyer's I*, docket no. 80 (July 1, 2014), docket no. 85 (July 29, 2014); JA 431-36.

On remand, the NLRB – now with a full complement of five Senate-confirmed Board members – issued a new decision and order finding that Dreyer's had committed an unfair labor practice by refusing to recognize and bargain with the Union. *Nestle-Dreyer's Grand Ice Cream, Inc.*, 361 NLRB No. 95 (Nov. 5, 2014); JA 437. Dreyer's filed this petition for review to challenge that new decision and the Board filed a cross-petition to enforce.

SUMMARY OF THE ARGUMENT

To determine whether a petitioned-for bargaining unit is appropriate for collective bargaining, the Board evaluates whether employees within the unit share a community of interest amongst themselves as well as whether their interests are sufficiently distinct from the interests of employees outside the unit. An employer who contends that a bargaining unit is inappropriate on the basis that excluded employees should be included in the unit must therefore show that the Board's conclusion that the interests of the two groups of employees are distinct was error. In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011), enfd. sub. nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the Board adopted the D.C. Circuit's description of the required showing: "that employees in the more encompassing unit share 'an overwhelming community of interest' [with employees in the petitioned-for unit] such that there 'is no legitimate basis upon which to exclude certain employees from it.'" *Id.*, slip op. 11 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008)).

In this case, the Board found that the petitioned-for bargaining unit of maintenance employees at Dreyer's plant is appropriate because, based on an evaluation of the traditional community of interest factors, the maintenance employees are sufficiently distinct from the production employees the Company

contends should be included in the unit. In challenging the Board's conclusion, Dreyer's emphasizes a few general benefits and policies that apply to all Dreyer's employees. These general benefits and policies do not outweigh the Board's many specific findings regarding the maintenance employees' distinct training, skills, functions, and supervision. Similarly, the cases Dreyer's cites as support for its claim that only a combined maintenance and production employee unit is appropriate are easily distinguishable from this case.

Instead of seriously challenging the Board's concrete bargaining unit determination, Dreyer's takes issue with the Board's use of the "overwhelming community of interest" standard adopted in *Specialty Healthcare*, claiming that it constitutes a new test for determining when a bargaining unit is appropriate and that the substance of that test conflicts with this Court's decision in *NLRB v. Lundy Packing*, 68 F.3d 1577 (4th Cir. 1995). Neither claim withstands scrutiny. The phrase "overwhelming community of interest," which the Board adopted from the D.C. Circuit's description of the Board's traditional approach to bargaining unit determinations, is entirely consistent with the heightened showing the Board has always required when an employer contends that additional employees *must* be included in a bargaining unit. Nothing in *Lundy Packing* bars the Board from adopting this formulation of the traditional standard. *Lundy Packing* holds only that the NLRB may not presume a union-proposed unit proper and then require the

employer to show that there is an overwhelming community of interest with excluded employees in order to prove the unit inappropriate. In *Specialty Healthcare*, the Board explained that it would not presume that a petitioned-for unit is appropriate but would instead apply its traditional community of interest test to determine in each case whether employees in the unit share a community of interest with each other and whether those interests are sufficiently distinct from those of employees outside the unit before applying the overwhelming community of interest standard.

STANDARD OF REVIEW

In challenging an NLRB bargaining unit determination, “[t]he Employer has the difficult burden of demonstrating an abuse of the broad discretion accorded to the Board.” *Fair Oaks Anesthesia Assoc., P.C. v. NLRB*, 975 F.2d 1068, 1071 (4th Cir. 1992). That is because “[t]he determination of an appropriate bargaining unit ‘lies largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed.’” *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 624 (4th Cir. 2013) (quoting *South Prairie Constr. Co. v. International Union of Operating Engineers*, 425 U.S. 800, 805 (1976)). “An employer who challenges a unit determination, therefore, has a heavy burden to convince a reviewing court that the bargaining unit selected is inappropriate.” *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 120 (4th Cir. 1978). “It must establish either

that there exists no community of interests among the members of the unit selected or that the unit selected runs afoul of the congressional proscription against allowing the extent of union organization to control the determination of the bargaining unit.” *Ibid.* (citing 29 U.S.C. § 159(c)(5)).

ARGUMENT

1. Section 9(b) of the NLRA delegates to the Board the authority to “decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” 29 U.S.C. § 159(b). This Court has thus recognized that “the Board is possessed of the widest possible discretion in determining the appropriate unit.” *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 624 (4th Cir. 2013) (citing *Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 534 (4th Cir. 1999)). “This wide discretion reflects acknowledgement of the Board’s expertise in such matters and its need for flexibility in shaping the bargaining unit to the particular case.” *Sandvik Rock Tools*, 194 F.3d at 534 (quotation marks, citations and brackets omitted).

It is highly pertinent in regard to the Board’s application of its traditional community of interest test that “[i]n many cases, there is no ‘right unit’ and the Board is faced with alternative appropriate units.” *Enterprise Leasing*, 722 F.3d at

625 (quoting *Corrie Corp. of Charleston v. NLRB*, 375 F.2d 149, 154 (4th Cir. 1967)). “[E]mployees may seek to organize ‘a unit’ that is ‘appropriate’ – not necessarily *the* single most appropriate unit.”” *Ibid.* (quoting *Am. Hosp. Ass’n. v. NLRB*, 499 U.S. 606, 610 (1991)) (emphasis in original). “Thus, one union might seek to represent all of the employees in a particular plant, those in a particular craft, or perhaps just a portion thereof.” *Am. Hosp. Ass’n.*, 499 U.S. at 610.

In exercising its “wide discretion . . . [to] shap[e] the bargaining unit to the particular case,” *Sandvik Rock Tools*, 194 F.3d at 534, “the Board’s focus is on whether the employees share a ‘community of interest.’” *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985) (quoting *South Prairie Constr.*, 425 U.S. at 805). That is because “[a] cohesive unit – one relatively free of conflicts of interest – serves the Act’s purpose of effective collective bargaining, and prevents a minority interest group from being submerged in an overly large unit.” *Ibid.* (citations omitted). Thus, “[t]he ‘community of interest test’ requires the Board to examine twelve equally important criteria in determining whether the employees seeking to be represented by the union share a sufficient community of interest to form an appropriate bargaining unit.” *Enterprise Leasing*, 722 F.3d at 627 n.8 (citing *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1580 (4th Cir. 1995)).¹

¹ Those factors are: “(1) similarity in the scale and manner of determining the earnings; (2) similarity in employment benefits, hours of work, and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications,

At the same time, the community of interest test also requires the Board to examine whether “[t]he excluded . . . employees . . . differ” from employees in the petitioned-for bargaining unit with regard to the traditional community of interest factors. *Lundy Packing*, 68 F.3d at 1580. The Board thus considers “whether, in distinction from other employees, the employees in the proposed unit have ‘different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit.’” *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (quoting *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 n. 11 (D.C. Cir. 1996)).

In its *Specialty Healthcare* decision, the Board affirmed that it would continue to look both inside and outside the petitioned-for unit when applying the community of interest test, examining:

“[W]hether the employees are organized into a *separate* department; have *distinct* skills and training; have *distinct* job functions and perform *distinct* work, including inquiry into the amount and type of job overlap between

skills and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; [and] (12) extent of union organization.” *Enterprise Leasing*, 722 F.3d at 627 n.8.

classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have *distinct* terms and conditions of employment; and are *separately* supervised." 357 NLRB No. 83, slip op. 9 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)) (emphasis added).

Dreyer's could therefore not be more wrong in its assertion that, after *Specialty Healthcare*, the Board "look[s] solely at the petitioned-for unit when determining whether that unit was appropriate," rather than undertaking a "comparison between the petitioned-for employees and those outside the unit to determine whether the former group was 'sufficiently distinct' to warrant separate bargaining." Pet. Br. 50-51. And, the Company's related claim that *Specialty Healthcare* "does not even acknowledge" *Wheeling Island Gaming*, 355 NLRB 637 (2010), and similar cases, Pet. Br. 50-51, is also incorrect.

The Board stated explicitly in *Specialty Healthcare*, quoting *Wheeling Island Gaming*, that consideration of the community of interest factors "'never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another.'" 357 NLRB No. 83, slip op. 11 (quoting *Wheeling Island Gaming*, 355 NLRB at 637 n.2). Rather, "the inquiry must proceed to determine 'whether the interests of the group sought are *sufficiently distinct* from those of other employees.'" *Ibid.* (quoting *Wheeling*

Island Gaming, 355 NLRB at 637 n.2) (emphasis in *Wheeling Island Gaming*).

See also Macy's, Inc., 361 NLRB No. 4, slip op. 13 (July 22, 2014) (reiterating that “[t]he[] legal principles[] articulated in *Wheeling Island Gaming* . . . [were] reaffirmed in *Specialty Healthcare*”). In short, “the test of ‘disparateness’ . . . is, in practice, already encompassed logically within the community-of-interest test as [the Board] historically ha[s] applied it.” *Newton-Wellesley Hospital*, 250 NLRB 409, 412 (1970).

Where an employer challenges a petitioned-for bargaining unit on the ground that employees who are insufficiently distinct from employees in the unit have been improperly excluded, this Court has stated that the employer “has the burden to prove that the bargaining unit selected is ‘utterly inappropriate.’”

Enterprise Leasing, 722 F.3d at 626-27 (quoting *Sandvik Rock Tools*, 194 F.3d at 534, in turn quoting *Arcadian Shores*, 580 F.2d at 120). To prove that a unit is “utterly inappropriate,” the employer must show, based on the application of the traditional community of interest factors, that there is no “reasonable basis for the exclusion” of those employees outside the petitioned-for unit, *i.e.*, that there are insufficient “‘distinguishing factors’ between the included and excluded workers.” *Sandvik Rock Tools*, 194 F.3d at 538 (quoting *Lundy Packing*, 194 F.3d at 1580-81). In contrast, if there is a “reasonable basis” to “distinguish between the two groups,” the employer has not met its burden of showing that the petitioned-for

unit is “utterly inappropriate.” *Id.* at 534, 538.

This is the same standard the Board used in *Specialty Healthcare*. As this Court has explained, “[i]n *Specialty Healthcare*, the Board noted that additional employees share an overwhelming community of interest with the petitioned-for employees only when there is no legitimate basis upon which to exclude the employees from the larger unit because the traditional community of interest factors ‘overlap almost completely.’” *Enterprise Leasing*, 722 F.3d at 627 (quoting *Specialty Healthcare*, 357 NLRB No. 83, slip op. 11). Whether the standard is described as an employer needing to show that there is no “reasonable basis for the exclusion” of employees outside the petitioned-for unit because there are no “‘distinguishing factors’ between the included and excluded workers,” *Sandvik Rock Tools*, 194 F.3d at 538 (quoting *Lundy Packing*, 194 F.3d at 1580-81), or that “there is no legitimate basis upon which to exclude the employees from the larger unit because the traditional community of interest factors ‘overlap almost completely,’” *Enterprise Leasing*, 722 F.3d at 627 (quoting *Specialty Healthcare*, 357 NLRB No. 83, slip op. 11), the showing required of the employer is the same.

2. The Board properly applied the community of interest test in making the bargaining unit determination in this case. After examining both whether “the maintenance employees . . . share[] a community of interest amongst themselves under traditional community of interest criteria” and whether the maintenance

employees constitute a “distinct group” from production employees, DDE 19; JA 420, the NLRB Regional Director correctly concluded that the maintenance employees constitute an appropriate unit for collective bargaining and that Dreyer’s had failed to show that the unit was inappropriate. Although Dreyer’s cites several Board decisions in support of its argument that the maintenance employees are not sufficiently distinct from production employees to constitute their own unit, those cases are easily distinguishable.

a. Dreyer’s argues that a bargaining unit of maintenance employees is inappropriate on the ground that the Regional Director “seized on insignificant differences between the production and maintenance employees” and “ignored or downplayed the substantial similarities between the two groups,” Pet. Br. 62, *i.e.*, that the Board’s conclusion that the maintenance employees are a “distinct group” from production employees was incorrect. DDE 19; JA 420. The Regional Director’s conclusion that “[t]he maintenance employees are readily identifiable as a separate group because they are in their own department, and are in different job classifications, have different skills, and perform different functions from production employees,” DDE 15; JA 416, is fully supported by the evidence in this case.

As an initial matter, Dreyer’s placed its maintenance employees “in a separate departmental section” from production employees. “All maintenance

employees are on the Technical Operations Team,” whereas “[a]ll production employees are on either the Manufacturing Team or the Pre-Manufacturing Team.” *Ibid.* Dreyer’s also employs its maintenance employees in “different job classifications than the production employees.” *Ibid.* Maintenance employees are classified as “Entry Maintenance Mechanics, Maintenance Technicians, Maintenance Craftworkers, Maintenance Group Leaders and Maintenance Control Technicians. By contrast, Dreyer’s production employees are classified as “Ice Cream Makers I, Ice Cream Maker II, Mix Maker, Warehouse Specialist and Palletizing Specialist.” *Ibid.*

In their separate department, Dreyer’s maintenance employees “report[] directly to their own maintenance supervisors.” DDE 17; JA 418. “Although production supervisors can call or page a maintenance mechanic, the maintenance mechanic must first confer with his maintenance supervisor in order that the maintenance supervisor may prioritize his work.” *Ibid.*

In addition, “[m]aintenance and production employees perform different functions” within Dreyer’s plant. *Ibid.* As the Regional Director summarized, “the maintenance employees are primarily in charge of maintaining the Employer’s machinery, and the production employees are primarily in charge of producing the ice cream.” *Ibid.* Dreyer’s argues in general terms that “[b]oth groups perform tasks essential to the support of the production process” and “interact daily and

frequently on the production floor.” Pet. Br. 63-64. However, the Regional Director found concretely that “[m]aintenance employees rarely perform duties typically performed by production employees” and “spend about 90% of their time performing skilled maintenance work,” DDE 7; JA 408, factual conclusions that Dreyer’s does not contest.

Maintenance employees are required by Dreyer’s to have “very different skills than the production employees.” DDE 15; JA 416. “Maintenance employees, unlike production employees, are required to have one year experience in computerized maintenance management, two years experience in troubleshooting pneumatics, hydraulics, and electrical and manufacturing, and five to seven years experience in industrial high speed maintenance,” *ibid.*, and “must pass a written test assessing their skill levels in these areas,” DDE 8; JA 409. “Certain maintenance employees who work on refrigeration systems require RITA [sic] certification; no production employees are required to hold RITA certification.” *Ibid.*

The Regional Director found that it was “[f]urther reflective of the maintenance employees’ greater skill . . . that there is virtually no temporary interchange between maintenance and production employees” – since production employees lack the requisite skills to do the maintenance employees’ work – and “unlike production employees, maintenance employees are required to provide

their own costly tools,” and receive a tool allowance for that purpose. DDE 10, 18-19; JA 411, 419-20. Dreyer’s Maintenance Manager estimated that the tools purchased by each maintenance employees can cost as much as \$5,000, a significant personal expense not required of production employees. DDE 19 n. 22; JA 420.

Dreyer’s also requires that its maintenance employees work a different schedule than production employees. Most maintenance employees work “four days a week, 10 hours per day[]” and “are paid overtime on reaching 10 hours a day or 40 hours a week.” DDE 17; JA 418. In contrast, production employees, “work five days a week, eight hours per day” and “accrue overtime on reaching 8 hours a day or 40 hours per week.” *Ibid.* Maintenance employees are provided with a paid meal period, whereas production employees’ meal period is unpaid. JA 77-78.

Finally, Dreyer’s pays most of its maintenance employees substantially more than it pays its production employees. “Maintenance employees earn a range from about \$20.00 per hour to \$30.00 per hour, whereas production employees earn a range from about \$15.00 per hour to \$22.00 per hour.” DDE 17; JA 418. Dreyer’s claims that the “wage overlap” between these pay ranges is evidence of the similarity between the two groups. Pet. Br. 53-54 n.11. As the Regional Director correctly found, however, this overlap is not only “insignificant” as a numerical

matter, but “[i]n the Employer’s wage chart, of the five classifications of maintenance-type employees, only one classification, the Entry Maintenance Mechanic, has any overlap with production employees’ wage rates” at all. *Ibid.*

The Regional Director took account of the similarities that exist between maintenance employees and production employees but found them to be of minor importance in his overall analysis of the community of interest factors. For example, the Regional Director found that “[m]aintenance and production employees share other terms and conditions of employment, as well as fringe benefits.” DDE 19; JA 420. And, relatedly, Dreyer’s emphasizes that the two groups “use the same cafeteria, parking lot, break rooms, and locker room,” “receive identical annual evaluations,” and “follow the same work place policies articulated in the same employee handbook.” Pet Br. 64. Because these benefits and policies apply to all employees at Dreyer’s plant, JA 336 (Hearing Ex. 9, Employee Handbook); *see generally* JA 333-49 (describing policies and benefits), however, the Regional Director did not err in concluding that these general similarities are outweighed by the numerous specific factors supporting a finding that “[t]he maintenance employees are readily identifiable as a separate group.” DDE 15; JA 416. As NLRB Member Hayes, who dissented in *Specialty Healthcare*, explained in joining the denial of Dreyer’s request for review, “under the traditional community-of-interest test, the interests of the petitioned-for unit are

sufficiently distinct from the production employees.” JA 426.²

b. Dreyer’s also cites four decisions in which the Board found maintenance employee bargaining units inappropriate as support for its argument that only a combined maintenance employee and production employee unit is appropriate in this case. Pet. Br. 52-54. At the same time, the Company also contends that, “had these past cases been reviewed under the *Specialty Healthcare* standard, their outcomes would have been different,” in an effort to prove that the *Specialty Healthcare* standard constituted a change in Board law. Pet. Br. 52. In fact, the Board has routinely approved maintenance employee units in cases presenting similar facts to this one based on the application of traditional community of interest factors. In contrast, all four cases cited by Dreyer’s are easily distinguishable from the facts at issue here. Nothing in *Specialty Healthcare* would have changed the outcome of those cases.

² *Amicus curiae* National Association of Manufacturers (NAM) contends that “the Board erroneously . . . failed to give proper consideration to the bargaining history that included a broader unit of maintenance and production employees.” NAM *Amicus* Br. 5. Because Dreyer’s did not raise this argument in its opening brief, it is waived. *United States v. Al-Hamdi*, 356 F.3d 564, 571 (4th Cir. 2004) (“It is a well settled rule that contentions not raised in the argument section of the opening brief are abandoned.”). Moreover, there is no merit to NAM’s contention. As the Regional Director explained, neither the 1988 contract [with the Teamsters] nor the invalidated certification of election were determined by the Board,” and “[b]argaining history determined by the parties and not the Board is not binding.” DDE 20; JA 421 (citing *Laboratory Corp. of Am. Holdings*, 341 NLRB 1079, 1083 (2004)). Even if the Board had determined that a unit of maintenance and production employees was an appropriate unit and bargaining in this unit had taken place, that would not preclude a union from later seeking to represent a smaller unit composed only of maintenance employees because such a unit could also be appropriate under traditional community of interest factors. DDE 21; JA 422.

Dreyer's acknowledges the Board's longstanding rule that the Board "examine[s] on a case-by-case basis the appropriateness of separate maintenance department units." Pet. Br. 60 (quoting *American Cyanamid Co.*, 131 NLRB 909, 912 (1961)). Following this "case-by-case" approach, the Board has found units of maintenance employees appropriate on numerous occasions. See, e.g., *Capri Sun, Inc.*, 330 NLRB 1124 (2000); *Ore-Ida Foods, Inc.*, 313 NLRB 1016 (1994), *enfd. mem.* 66 F.3d 328 (7th Cir. 1995); *Franklin Mint Corp.*, 254 NLRB 714 (1981); *Philips Products Co.*, 234 NLRB 323 (1978). The facts presented by this case bear a strong similarity to those cases.

In *Capri Sun*, for example, the Board found a maintenance employee unit appropriate based on findings of "a separate maintenance department under the supervision of the plant maintenance supervisor," "a significantly higher skill level than the production employees," a "level of interchange between the maintenance and production employees [that] is not significant," and the fact that "[u]nlike the production employees, maintenance employees are required to provide their own tools." 330 NLRB at 1125-26. Similarly, in *Ore-Ida*, the Board based its determination that a maintenance employee unit was appropriate on the facts that maintenance employees "are in their own separate departmental section with their own supervisors," are "highly skilled," and engaged in only "limited . . . interchange" with production employees. 313 NLRB at 1019-20. In both cases,

the Board thus concluded that “a sufficient separate community of interest exists” for a maintenance employee unit to be appropriate. *Id.* at 1019. *See also Capri-Sun*, 330 NLRB at 1124 (holding same).

In contrast, the four cases relied on by Dreyer’s are easily distinguishable from this case. And, the Board would have reached the same results had it applied the approach to bargaining unit determinations described in *Specialty Healthcare* to the facts of those cases.

In both *Buckhorn, Inc.*, 343 NLRB 201 (2004), and *F & M Schaefer Brewing Co.*, 198 NLRB 323 (1972), the Board applied its traditional community of interest factors to determine that the maintenance employees in those cases were not sufficiently distinct from the production employees with whom they worked to “constitute a distinct and homogeneous group,” *F & M Schaefer*, 198 NLRB at 325, a conclusion consistent with *Specialty Healthcare*’s requirement that a petitioned-for unit “be readily identifiable as a group and . . . share a community of interest using the traditional criteria.” 357 NLRB No. 83, slip op. 11 n.25.

In both cases, the maintenance employees at issue had similar skills to production employees and, in both cases, the majority of maintenance employees were not supervised separately from production employees. In *Buckhorn*, there were “no educational or certification requirements” for maintenance employees and consequently there was “not a wide disparity in skill level between the

maintenance employees and the production employees.” 343 NLRB at 203. In *F & M Schaefer*, the Board found that “applicants for both production and maintenance jobs are required to have some maintenance or mechanical background,” “[b]oth are given the same mechanical aptitude test,” “both undergo essentially the same training,” and the maintenance position “requires little [skill] beyond basic mechanical ability and a knowledge and understanding of the specific equipment used at the . . . plant.” 198 NLRB at 324. In *Buckhorn*, 14 of the 19 maintenance employees were “supervised by the shift production supervisor who also supervises production employees,” rather than a separate maintenance supervisor. 343 NLRB at 203-04. Likewise, in *F & M Schaefer*, “two-thirds of the maintenance employees . . . [we]re under the supervision of production foremen.” 198 NLRB at 324.

The other cases cited by Dreyer’s – *TDK Ferrites Corp.*, 342 NLRB 1006 (2004), and *Peterson/Puritan, Inc.*, 240 NLRB 1051 (1979) – are distinguishable from this case on the ground that neither petitioned-for unit was a traditional maintenance employee unit at all, but rather involved a “fractured unit” of the sort that *Specialty Healthcare* held inappropriate. See 357 NLRB No. 83, slip op. 13 (describing a fractured unit as “an arbitrary segment of what would be an appropriate unit”).

In *TDK Ferrites*, the union sought to represent a unit that included both

maintenance department employees as well as “production technicians, tooling specialists, and set-up specialists,” *i.e.*, a unit composed of maintenance employees plus a fraction of the employer’s production employees. 342 NLRB at 1006. The Board found that the latter three categories of employees shared a strong community of interest with the company’s production operators, including that “aside from the maintenance department employees, all other employees in the petitioned for job classifications are supervised by production supervisors.” *Id.* at 1008. With regard to the production technicians in particular – the largest of the petitioned-for classifications – the Board also found that they “spend a significant portion of their workweek operating equipment,” including reliev[ing] production operators during breaks and fill[ing] in for production operators when they are absent.” *Ibid.* The Board thus concluded that the petitioned-for groups “share a broad community of interest [with production employees] that outweighs any nominal community of interest that may be enjoyed solely by the petitioned-for employees.” *Id.* at 1009.

In *Peterson/Puritan*, conversely, the union sought to represent a fractured unit composed only of the employer’s “line mechanics” rather than a unit “encompassing [the] whole maintenance department[.]” 240 NLRB at 1051 & n.3. In a brief decision, the Board concluded that because the line mechanics “are neither highly skilled nor required to possess any previous experience or formal

training,” and their work “constitutes only a portion of the maintenance work performed at the facility,” their community of interest was not sufficiently separate from either the production employees or other maintenance employees to constitute a unit of their own. *Id.* at 1051. In reaching this conclusion, the Board distinguished cases in which “units encompassing whole maintenance departments were found appropriate,” noting that it was expressly “not deciding whether or not the line mechanics share a community of interest with production workers greater than that shared with other maintenance employees.” *Id.* at 1051 n.3.

3. Rather than seriously challenge the Board’s concrete bargaining unit determination in this case, Dreyer’s instead takes issues with the Board’s *Specialty Healthcare* decision, contending that that decision constituted a radical change to the Board’s approach to bargaining unit determinations. Dreyer’s also argues that the Board’s use of the overwhelming community of interest standard in *Specialty Healthcare* conflicts with this Court’s decision in *Lundy Packing*. As we demonstrate, the Board’s use of the overwhelming community of interest standard in *Specialty Healthcare* is consistent with the Board’s traditional approach to bargaining unit determinations and does not conflict with *Lundy Packing*.

a. Dreyer’s challenge to the Board’s explanation of its traditional approach to bargaining unit determinations in *Specialty Healthcare* concerns the Board’s use of the phrase “overwhelming community of interest” to describe the showing an

employer must make to prove that the Board erred in its bargaining unit determination. Because that phrase accurately describes the showing the Board has traditionally required when an employer contends that a petitioned-for bargaining unit is inappropriate because it does not include additional employees, Dreyer's challenge is without merit.

The Board acknowledged in *Specialty Healthcare* that “different words have been used . . . to describe th[e] heightened showing” that an employer must make to demonstrate that a Board bargaining unit determination is incorrect. 357 NLRB No. 83, slip op. 11. For example, the Board has used the phrases “*substantial* community of interest,” *Id.*, slip op. 12 & n. 26 (quoting *Lawson Mardon, U.S.A.*, 332 NLRB 1282, 1282 (2000); *Colorado National Bank of Denver*, 204 NLRB 243, 243 (1973)) (emphasis in *Specialty Healthcare*), “*strong* community of interest,” *ibid.* (quoting *J.C. Penney Co.*, 328 NLRB 766, 766 (1999)) (emphasis in *Specialty Healthcare*), and “*so significant*” a community of interest, *ibid.* (quoting *Home Depot, USA*, 331 NLRB 1289, 1289 (2000); *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701-02 (1967) (emphasis in *Specialty Healthcare*), to describe the required showing.

Whether the phrase used is “substantial,” “strong,” “so significant,” or “overwhelming,” the meaning is the same – the employer must show that the shared community of interest between employees within the unit and outside the

unit is sufficient such that there is no “reasonable basis for the exclusion” of employees outside the petitioned-for unit because there are no “‘distinguishing factors’ between the included and excluded workers,” *Sandvik Rock Tools*, 194 F.3d at 538 (quoting *Lundy Packing*, 194 F.3d at 1580-81). As the D.C. Circuit explained, “[t]hat the excluded employees share a community of interest with the included employees does not . . . mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate bargaining unit. If, however, the excluded employees share an overwhelming community of interest with the included employees, then there is no legitimate basis upon which to exclude them from the bargaining unit.” *Blue Man Vegas*, 529 F.3d at 421. The fact that the Board has chosen to use the phrase “overwhelming community of interest” rather than another similar phrase drawn from the Board’s precedent does not constitute a change to the Board’s approach to unit determinations.

Dreyer’s also complains that the Board had only infrequently used the phrase “overwhelming community of interest” in its own decisions to describe what the employer must show to prove a bargaining unit inappropriate on the basis that it excludes additional employees. Pet. Br. 48. But, as both the D.C. Circuit and Sixth Circuit recognized, “[t]he Board has used the overwhelming-community-of-interest standard before, so its adoption in *Specialty Healthcare* [] is not new,”

Kindred Nursing Centers East, 727 F.3d at 561-62 (citing Board cases); *Blue Man Vegas*, 529 F.3d at 421 (citing same cases). “Moreover, as the Board explained in *Specialty Healthcare* [], not only has the Board used this test before, but the District of Columbia Circuit approved of the Board’s use of it in *Blue Man Vegas* [], which denied review of the employer’s challenge to a bargaining unit determination and enforced the Board’s order.” *Kindred Nursing Centers East*, 727 F.3d at 562.

Examples of the Board’s use of the overwhelming community of interest test include *Jewish Hospital Ass’n*, 223 NLRB 614, 617 (1976), in which the Board found the petitioned-for unit of service employees inappropriate based on the “overwhelming community of interest” those employees held in common with maintenance employees. In *Lodgian, Inc.*, 332 NLRB 1246, 1255 (2000), the Board required the inclusion of a small number of “concierge” employees in the petitioned-for bargaining unit of hotel employees on the basis that they “share[d] an overwhelming community of interest with the employees whom the [union] seeks to represent.” And, in *Laneco Construction Systems, Inc.*, 339 NLRB 1048, 1050 (2003), the Board found that the employer failed to meet the required standard of showing that employees supplied by an outside company and jointly employed by the employer “shared such an overwhelming community of interests with its solely-employed carpenters and helpers that a unit excluding the former

employees would be inappropriate.” Of equal importance, as we have already explained, even where the Board has used different words to describe the employer’s required showing – such as “substantial,” “strong,” or “so significant” – the “[d]ecisions of the Board . . . in unit determination cases generally conform to a consistent analytic framework.” *Blue Man Vegas*, 529 F.3d at 421.

Because the overwhelming community of interest standard is entirely consistent with the Board’s and this Court’s decisions, Dreyer’s claim that the Board’s adoption of the D.C. Circuit’s description constitutes “a completely new test to determine when a proposed unit is appropriate,” Pet. Br. 37-38, is without merit.

b. Dreyer’s also contends that the Board’s approach violates Section 9(c)(5) of the NLRA – which states that “[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling,” 29 U.S.C. 159(c)(5) – by “mak[ing] the extent of union organization controlling,” in the manner rejected by this Court’s decision in *Lundy Packing*. Pet. Br. 30. As this Court, the D.C. Circuit, and the Board have all cogently explained, the D.C. Circuit’s description of the Board’s traditional approach to bargaining unit determinations, as adopted by the Board in *Specialty Healthcare*, is distinguishable from the approach at issue in *Lundy Packing*.

In *Lundy Packing*, two unions petitioned to represent a unit of production

and maintenance employees at a meatpacking plant. 68 F.3d at 1579. The employer contended that this combined unit was inappropriate and that the only appropriate unit would also include a number of other employees in the plant, including a small group of quality control employees. *Ibid.* The Board rejected the employer's argument, applying, in this Court's words, a "new standard" in which "any union-proposed unit is presumed appropriate unless an 'overwhelming community of interest' exists between the excluded employees and the union-proposed unit." *Id.* at 1581.

This Court held that the Board's approach in *Lundy Packing* violated Section 9(c)(5) of the NLRA because "[b]y presuming the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization." *Lundy Packing*, 68 F.3d at 1579. In other words, "the fact that [] the union wanted a smaller unit . . . could not justify the Board's certifying such a unit if it were otherwise inappropriate." *Ibid.* (quoting *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093 (7th Cir. 1984)).

This Court has made clear in its post-*Lundy Packing* decisions, "that section 9(c)(5) allows the Board to consider the extent of organization as one factor in its unit determination decisions, but prohibits the extent of union organization from being 'the *dominant* factor in the Board's determination of the bargaining unit.'"

Overnite Transportation Co. v. NLRB, 294 F.3d 615, 619 (4th Cir. 2002) (quoting *Lundy Packing*, 68 F.3d at 1580) (emphasis in *Overnite Transportation*). Applying that understanding of Section 9(c)(5), this Court has twice rejected the argument that *Lundy Packing* prohibits the Board from approving a smaller bargaining unit that the union favors over the employer's objection, in both cases finding that traditional community of interest factors supported a conclusion that a smaller unit was appropriate. *Overnite Transportation*, 294 F.3d at 618 (unit of dockworkers and drivers that excluded mechanics); *Sandvik Rock Tools*, 194 F.3d at 538 (unit of employees from only one of employer's two divisions at same location).

As the D.C. Circuit has explained, the Board's error in *Lundy Packing* was "the combination of the overwhelming-community-of-interest standard and the presumption the Board had employed in favor of the proposed unit: 'By *presuming* the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization.'" *Blue Man Vegas*, 529 F.3d at 423 (quoting *Lundy Packing*, 68 F.3d at 1581) (emphasis added). In contrast, "[a]s long as the Board applies the overwhelming community-of-interest standard only *after* the proposed unit has been shown to be *prima facie* appropriate, the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight." *Ibid.* (emphasis added).

In *Specialty Healthcare*, the Board explicitly acknowledged the problem identified by this Court in *Lundy Packing* and ensured that, in adopting the D.C. Circuit’s description of the Board’s traditional approach to bargaining unit determinations, the Board would not repeat its mistake in *Lundy Packing*. The Board, after quoting the D.C. Circuit’s explanation of the Board’s error in *Lundy Packing*, explained that “[h]ere, we make clear that employees in the petitioned-for unit must be readily identifiable as a group and the Board must find that they share a community of interest using the traditional criteria *before* the Board applies the overwhelming-community-of-interest standard to the proposed larger group.” *Specialty Healthcare*, 357 NLRB No. 83, slip op. 11 n.25 (emphasis added).

In its recent *Enterprise Leasing* decision, this Court stated in dicta that “the overwhelming community of interest component of the community of interest standard [as used by the Board in *Specialty Healthcare*] may run afoul of our decision in *Lundy Packing*,” but only if the Board were to ““presume the union-proposed unit proper unless there is an overwhelming community of interest with excluded employees.”” 722 F.3d at 627 n.9 (quoting *Lundy Packing*, 68 F.3d at 1581). As we have just explained, the Board in *Specialty Healthcare* made clear that it does *not* “presume the union-proposed unit proper,” *ibid.*, but rather requires “that employees in the petitioned-for unit must be readily identifiable as a group and the Board must find that they share a community of interest using the

traditional criteria *before* the Board applies the overwhelming-community-of-interest standard to the proposed larger group,” 357 NLRB No. 83, slip op. 11 n.25 (emphasis added). *Enterprise Leasing*, therefore, provides further affirmation that the *Specialty Healthcare* Board’s adoption of the overwhelming community of interest standard is fully consistent with *Lundy Packing*.

The NLRB Regional Director in this case precisely followed the *Specialty Healthcare* Board’s guidance on the proper application of the overwhelming community of interest test. The Regional Director first analyzed whether “[t]he maintenance employees share a sufficient community of interest amongst themselves for purposes of collective bargaining” and whether “[t]he maintenance employees are readily identifiable as a separate group . . . from production employees.” DDE 15-16; JA 416-17. It was only after answering both of these questions affirmatively that the Regional Director then applied the overwhelming community of interest standard to evaluate Dreyer’s argument that only a combined unit of maintenance employees and production employees would be appropriate. DDE 19; JA 420. The Board’s bargaining unit determination in this case, therefore, was entirely consistent with *Lundy Packing*.

4. Dreyer’s remaining challenges to the Board’s approach to the bargaining unit determination in this case merit only brief discussion.

First, Dreyer’s claims that the approach to bargaining unit determinations set

forth in *Specialty Healthcare* is an abuse of discretion because it requires employers to prove the same overwhelming community of interest between employees in the petitioned-for unit and employees outside the unit as the Board requires when a union seeks to accrete a newly-created job category or department into an existing bargaining unit. Dreyer's claims that "[i]t makes no sense [for the Board] to apply the same standard" in the context of an initial unit determination as it does in the context of an accretion. Pet. Br. 55.

It is indeed true that the Board uses the overwhelming community of interest standard in accretion cases as well as in initial unit determination cases. This reflects the fact that "[a] finding of an accretion by the Board is similar to the Board's certifying a particular group of employees as an appropriate bargaining unit." *Universal Sec. Instruments, Inc. v. NLRB*, 649 F.2d 247, 253 (4th Cir. 1981). In an accretion, "additional employees are absorbed into the existing unit without first having an election where these additional employees share a sufficient community of interest with the unit employees and have no separate identity." *Ibid.* (quotation marks omitted). Thus, "[t]he decision to permit an accretion . . . reflects 'a legal conclusion that two groups of employees constitute one bargaining unit.'" *Blue Man Vegas*, 529 F.3d at 422 n.* (quoting *Northland Hub, Inc.*, 304 NLRB 665, 665 (1991)).

This is the same consideration – whether two groups of employees

necessarily constitute one bargaining unit – that is at stake when an employer challenges an initial bargaining unit determination on the basis that it excludes employees who *must* be included in the petitioned-for unit for that unit to be appropriate. There is nothing improper about the Board applying the same legal standard in this manner in these different unit determination contexts.

Dreyer’s also argues that – while acknowledging the Board’s authority to adjust its interpretation of the NLRA “via rulemaking or adjudication,” Pet. Br. 58 (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974)) – because the issue of the Board’s approach to bargaining unit determinations allegedly was not before the Board in *Specialty Healthcare*, the Board violated the Administrative Procedure Act (APA) by adopting the D.C. Circuit’s description of the Board’s traditional approach to bargaining unit determinations in that case.

Dreyer’s argument rests on two faulty premises. First, as we have already shown, the Board’s adoption of the D.C. Circuit’s description of the Board’s traditional approach to bargaining unit determinations in *Specialty Healthcare* did not constitute a change in the Board’s interpretation of the NLRA at all, but rather “conform[ed] to a consistent analytic framework” reflected in “[d]ecisions of the Board and of the courts in unit determination cases.” *Blue Man Vegas*, 529 F.3d at 421. As the Sixth Circuit explained in rejecting a similar argument by the employer in the *Specialty Healthcare* case, because “the Board may announce a

new principle in an adjudication, it follows that it may choose to follow one of its already existing principles” in such a proceeding as well. *Kindred Nursing Centers East*, 727 F.3d at 565 (discussing *Bell Aerospace*, 416 U.S. at 294).

Second, it is simply not the case that the issue of the Board’s approach to bargaining unit determinations was not before the Board in *Specialty Healthcare*. *Specialty Healthcare* concerned a union petition to represent a unit of certified nursing assistants (CNAs) in a nursing home, a petition the employer opposed on the ground that the smallest appropriate bargaining unit had to include additional employees. 357 NLRB No. 83, slip op. 1. Prior to *Specialty Healthcare*, Board precedent held that CNAs who worked in nursing homes were presumptively included in a broader unit of service and maintenance employees. *Specialty Healthcare*, 357 NLRB No. 83, slip op. 5 (discussing *Park Manor Care Center*, 305 NLRB 872 (1991)). The union’s petition to represent a unit of CNAs at a nursing home thus presented the Board with two interrelated issues: (1) whether the Board should overrule its precedent holding that nursing home CNAs presumptively should be included in larger units of service and maintenance employees; and (2) if so, what standard the Board should apply more generally when “a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees.” *Specialty*

Healthcare, 357 NLRB No. 83, slip op. 1.

When the Board in *Specialty Healthcare* overruled its precedent holding that nursing home CNAs presumptively should be included in a broader service and maintenance unit, the question of what standard the Board should apply more generally when an employer contends that a petitioned-for unit should contain additional employees was squarely before the Board. Thus, even if the Board's adoption of the D.C. Circuit's description of the Board's traditional approach to determining bargaining units constituted a change in the Board's interpretation of the NLRA – which, as we have shown, it did not – it would not have been a violation of the APA for the Board to make such a change through adjudication in the *Specialty Healthcare* case.

CONCLUSION

The Decision and Order of the Board should be enforced.

STATEMENT ON ORAL ARGUMENT

Because the NLRB applied its traditional approach to bargaining unit determinations in this case to decide that the petitioned-for unit of maintenance employees is appropriate, oral argument is not necessary in this case. However, if

this Court determines that it would be of assistance to the Court to hold oral argument, the Union respectfully requests leave to participate in order to explain why the Board's unit determination in this case is correct.

Dated: February 24, 2015

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND
TYPE STYLE REQUIREMENTS**

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,270 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

/s/ Matthew J. Ginsburg
Matthew J. Ginsburg

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2015, the foregoing Brief of Intervenor International Union of Operating Engineers Local 501 in Support of Respondent was filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system and by UPS Next Day Delivery.

The following participants in the case are registered CM/ECF users and will be served via the CM/ECF system:

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